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No. 96-1150

# In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH A. MAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER E. DELLINGER
*Acting Solicitor General*
LORETTA C. ARGRETT
*Assistant Attorney General*
ROBERT E. LINDSAY
ALAN HECHTKOPF
FRANK P. CIHLAR
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

15 pp

## QUESTIONS PRESENTED

1. Whether petitioner showed cause and prejudice sufficient to excuse his failure to raise his double jeopardy claim on direct review of his conviction.

2. Whether petitioner waived his double jeopardy claim.

3. Whether the civil penalties imposed on petitioner in this case for failure to pay his taxes were remedial in nature and therefore did not constitute "punishment" for purposes of the Double Jeopardy Clause.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is unpublished, but the decision is noted at 92 F.3d 1189 (Table). The opinion of the district court (Pet. App. A1-A4) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. A petition for rehearing was denied on October 3, 1996. Pet. App. C1. The petition for a writ of certiorari was filed on December 31, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner was convicted on his plea of guilty in the United States District Court for the Western District of Missouri to five counts of willfully failing to file an income tax return, in violation of 26 U.S.C. 7203. While proceedings on his appeal of his sentence were pending, petitioner filed this motion to vacate, set aside, or correct his conviction and sentence, pursuant to 28 U.S.C. 2255. He alleged that his sentence in this case was in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The district court denied the motion (Pet. App. A1-A4), and the court of appeals affirmed (*id.* at B1-B2).

1. During the years at issue in this case, 1985 through 1989, petitioner was a self-employed dentist, specializing in endodontics. He failed to file income tax returns (R. 182, 183; R. 196, at 3-5) and to pay at least $58,057 in income taxes for those years (R. 196, at 7).[1] Petitioner went to great lengths to hide his income during the years at issue. He purchased assets in the names of nominees and converted most of his income, which he received in the form of checks from patients, into cash. He paid most of his business expenses with cash or with cashier's checks and money orders purchased with cash or patient's checks. Petitioner also established nominee bank accounts, made deposits into the accounts, and used the accounts to pay personal and business expenses. *Id.* at 5-6.

Petitioner was eventually indicted on five counts of willfully failing to file an income tax return, in

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[1] References to "R." are to documents contained in the record on appeal, as numbered by the clerk of the district court.

violation of 26 U.S.C. 7203, and two counts of willfully attempting to evade and defeat income tax, in violation of 26 U.S.C. 7201 (R. 1). After entering into a plea agreement, petitioner pleaded guilty to the five counts of willfully failing to file an income tax return. R. 182, 183. He thereafter was sentenced to 191 days' imprisonment (time served), one year of supervised release, and four months of home detention. He was also ordered to pay all taxes, penalties, and interest due for the years in question, along with the costs of prosecution (R. 186, 194).

2. After the indictment had been returned, but before petitioner's guilty plea and sentencing, the IRS issued a jeopardy assessment against him for taxes, interest, and penalties owed to the United States for the years 1985 through 1989. Pet. C.A. App. 208. The jeopardy assessment was referred to in petitioner's plea agreement (*id.* at 251):

> 5. The United States and the defendant agree and stipulate that defendant should be ordered to pay his financial obligations on the criminal case as follows:
>
> a. on income tax due and owing for calendar years 1985 through 1989;
>
> b. for penalties for the same period; and
>
> c. for interest for the same period;
>
> The parties further agree that these obligations should be ordered to be paid as follows: that these obligations be satisfied in the first instance from the money seized as a result of the IRS jeopardy assessment. Any money in excess of these obligations shall be disposed of by order of the Court. Any deficiency shall be satisfied by the

> fixing of a payment schedule by the U.S. Probation Office for purpose of payments based upon defendant's earnings.

In accordance with this provision, and as part of petitioner's sentence, the district court ordered petitioner to "[p]ay all taxes, penalties, and interest due on a schedule developed by the Probation Office." *Id.* at 138. In fact, petitioner's tax obligations were satisfied with monies the IRS received as a result of levies it made pursuant to the jeopardy assessment.

3. On direct appeal, petitioner contended only that the costs of prosecution should not have been imposed as part of his sentence. The court of appeals reversed and remanded the case to the district court for reconsideration of the costs. *United States* v. *May*, 67 F.3d 706 (8th Cir. 1995). On remand, the district court determined that the assessed costs were reasonable and that petitioner had the financial ability to pay them. On petitioner's renewed appeal from that determination, the Eighth Circuit affirmed. *United States* v. *May*, No. 96-3005, 1997 WL 126785 (Mar. 21, 1997).

4. While his conviction was on remand to the district court, petitioner filed a motion under Section 2255. In that motion, petitioner contended for the first time that the tax penalties assessed against him barred the imposition of criminal penalties under the Double Jeopardy Clause. The district court denied petitioner's motion. It ruled that by entering into the plea agreement, petitioner had voluntarily waived any double jeopardy claim he otherwise might have had. Pet. App. A4.

5. The court of appeals affirmed. Pet. App. B1-B2. After a *de novo* review, the court of appeals determined that by voluntarily entering into the plea

agreement, petitioner foreclosed any challenge to his sentence. *Id.* at B2. Moreover, the court agreed with the government that petitioner "ha[d] failed to show cause and prejudice, or a fundamental miscarriage of justice, excusing his failure to raise the double jeopardy claim on direct appeal." *Ibid.*

**ARGUMENT**

1. Petitioner contends that the court of appeals should have reviewed his double jeopardy claim on the merits. He does not contend, however, that there was cause and prejudice excusing his failure to raise his double jeopardy claim on direct appeal. Section 2255 relief is not available to correct errors that could have been raised at trial or on direct appeal, absent a showing both of cause for the default and of actual prejudice resulting from the errors. *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982). Petitioner has made no such showing and, thus, is not entitled to relief under Section 2255.

2. Furthermore, contrary to petitioner's contention (Pet. 12-14), the courts below were correct in holding that petitioner waived his double jeopardy claim. The protection against double jeopardy or double punishment is a personal right that may be waived. *United States* v. *Broce*, 488 U.S. 563, 569-574 (1989); *Ricketts* v. *Adamson*, 483 U.S. 1 (1987). There are ample indicia in the record that petitioner waived his double jeopardy claim.

Pursuant to his plea agreement, petitioner pleaded guilty to five counts of willful failure to file a return, in violation of 26 U.S.C. 7203. In exchange, the government dismissed two counts charging willful attempted evasion of payment of tax, in violation of 26 U.S.C. 7201. In the agreement, petitioner agreed that

the maximum penalty for each of the failure-to-file counts was imprisonment for one year, a $100,000 fine, costs of prosecution, and a $25 special assessment. Plea Agreement 1 (¶ 2) (Pet. C.A. App. 249). He also agreed that he could not withdraw his plea if the court accepted it and imposed a sentence he did not like or with which he did not agree. *Id.* at 2-3, 6 (¶¶ 3, 16) (Pet. C.A. App. 249-250, 254). The agreement also provided (*id.* at 3) (Pet. C.A. App. 251) (emphasis added):

> 5. The United States and the defendant agree and stipulate that defendant should be ordered to pay his financial obligations on the criminal case as follows:
>
> a. on income tax due and owing for calendar years 1985 through 1989;
>
> b. *for penalties for the same period*; and
>
> c. for interest for the same period;
>
> The parties further agree that these obligations should be ordered to be paid as follows: *that these obligations be satisfied in the first instance from the money seized as a result of the IRS jeopardy assessment.* Any money in excess of these obligations shall be disposed of by order of the Court. Any deficiency shall be satisfied by the fixing of a payment schedule by the U.S. Probation Office for purpose of payments based upon defendant's earnings.

Thus, petitioner specifically agreed that the district court could (as it did) both impose a criminal punishment and order him to pay his back taxes, including penalties, with the taxes and penalties first being satisfied out of funds seized in connection with

the jeopardy assessment. The agreement plainly contemplated that petitioner could be punished in the criminal case notwithstanding the jeopardy assessment. He therefore agreed to what he now calls double punishment and waived any double jeopardy claim he otherwise may have had. See *Ricketts* v. *Adamson*, 483 U.S. at 9-10 (agreement specifying that original charges could be reinstated under certain circumstances after defendant pleaded guilty to lesser offense was equivalent to agreement waiving double jeopardy defense, even though "double jeopardy" was not specifically waived by name).

Even without regard to the plea agreement, petitioner's guilty plea bars consideration of his double jeopardy claim. Generally, a valid guilty plea is not subject to collateral attack. *United States* v. *Broce*, 488 U.S. at 569-574; *Brady* v. *United States*, 397 U.S. 742, 757 (1970); *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984). As this Court held in *Broce*:

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary.

488 U.S. at 569. See also *Mabry* v. *Johnson*, 467 U.S. at 508 ("It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."). Petitioner's guilty plea was counseled, and there is no evidence that

petitioner did not understand the charges against him or the ramifications of his plea.

Petitioner's reliance (Pet. 12, 15) on *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam), is misplaced. In *Menna*, this Court did "*not* hold that a double jeopardy claim may never be waived." *Id.* at 63 n.2 (emphasis added). Nor did the Court hold that a double jeopardy claim is never waived by a plea of guilty. The Court held, rather, that "a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Ibid.* There is nothing about the criminal charge in the instant case to suggest that (on its face or otherwise) it was barred by the Double Jeopardy Clause or could not be constitutionally prosecuted.[2]

Accordingly, petitioner waived his double jeopardy claim. The civil fraud penalties in this case thus posed no double jeopardy bar to petitioner's criminal conviction.

3. Finally, even if it were not barred by the cause-and-prejudice standard and had not been otherwise waived, petitioner's double jeopardy claim would be without merit. Contrary to petitioner's contention (Pet. 10), the imposition of a civil fraud penalty does not constitute "punishment" that bars a subsequent criminal prosecution. Consistently with the Double Jeopardy Clause, Congress may impose both a criminal and a civil sanction with respect to the same act or omission. See *United States* v. *Halper*, 490 U.S

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[2] Unlike Menna, who pleaded guilty only after his double jeopardy claim had been rejected by the court, petitioner here did not make his double jeopardy claim until long after his guilty plea, sentencing, and direct appeal.

435, 450 (1989); *United States* v. *Morgan*, 51 F.3d 1105, 1113 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995). If the civil sanction is remedial in nature, rather than punitive, it does not constitute punishment and may be imposed on the same conduct in the same or successive proceedings.[3] *United States* v. *Halper*, 490 U.S. at 448-449; *United States* v. *Morgan*, 51 F.3d at 1113.

The civil fraud penalties under the tax laws long have been recognized to be merely remedial, providing reimbursement to the government for its investigation and other costs of a taxpayer's fraudulent activities. *Helvering* v. *Mitchell*, 303 U.S. 391, 401 (1938). In *Helvering* v. *Mitchell*, this Court held that the then-50% addition to tax for fraud and other "'Additions to the Tax' were intended by Congress as civil incidents of the assessment and collection of the income tax." *Id.* at 405. This Court pointed out:

> The remedial character of sanctions imposing additions to a tax has been made clear by this

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[3] Moreover, even if the tax penalties were considered punishment in the constitutional sense, multiple punishments that would be impermissible if imposed in successive proceedings are permissible if imposed in a single proceeding. See *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983); *United States* v. *Halper*, 490 U.S. at 450. For these purposes, the jeopardy assessment against petitioner and the levies under it were not a "proceeding" or a final adjudication of petitioner's tax liability. Petitioner could have contested the jeopardy assessment in district court or the underlying tax liability in Tax Court. See 26 U.S.C. 6861(b), 6863; *Laing* v. *United States*, 423 U.S. 161, 170-171 (1976). Since petitioner was required to pay the fraud penalties only as part of the criminal judgment in this case, there were no successive proceedings to implicate the Double Jeopardy Clause.

> Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.

*Id.* at 401. *Helvering* v. *Mitchell* conclusively establishes that the fraud penalties that petitioner agreed to pay are remedial. They do not constitute punishment and do not implicate the Double Jeopardy Clause.

The same result follows from this Court's decision in *Halper*. In that case, the Court held that a civil penalty constituted punishment for purposes of the Double Jeopardy Clause only in the "rare case" where it was so "overwhelmingly disproportionate to the damages he has caused" that "it constitutes a second punishment." 490 U.S. at 449, 450. See also *United States* v. *Morgan*, 51 F.3d at 1115. *Halper* was such a "rare case," because the government sustained an actual loss of only $585, while the authorized civil sanction for Halper's conduct amounted to more than $130,000. 490 U.S. at 438-439.

Measured by the *Halper* standard, the fraud penalties in this case cannot be characterized as punishment. The government alleged in its jeopardy assessment that petitioner owed a total of $179,185, of which $56,178 was attributable to the fraud penalties. Pet. C.A. App. 219-223.[4] Those penalties were not disproportionate to the damages resulting from petitioner's conduct. The government "is entitled to rough reme-

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[4] Pursuant to the Internal Revenue Code, depending on the tax year, the penalties were 50% or 75% of the portion of the underpayment that was attributable to fraud. See, *e.g.*, 26 U.S.C. 6653(b) (1982) 6653(b) (1988).

dial justice" and "may demand compensation according to somewhat imprecise formulas" without crossing the line between remedial sanctions and punishment. *United States* v. *Halper*, 490 U.S. at 446; *United States* v. *Morgan*, 51 F.3d at 1113. As this Court pointed out in *Halper*, 490 U.S. at 449, "in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole." Here, the penalties were merely a percentage of the taxes due and were less than double damages. Accordingly, petitioner's double jeopardy claim is groundless.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER E. DELLINGER
*Acting Solicitor General*
LORETTA C. ARGRETT
*Assistant Attorney General*
ROBERT E. LINDSAY
ALAN HECHTKOPF
FRANK P. CIHLAR
*Attorneys*

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